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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. **76-804**

GEORGE R. CAESAR, M.D.,
Petitioner,

VS.

LOUIS P. MOUNTANOS,
(as Sheriff)
of the County of Marin,
State of California, et al.,
Respondents.

**RESPONSE IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

DOUGLAS J. MALONEY,
County Counsel of Marin County,
Civic Center,
San Rafael, California 94903,
Counsel for Respondents.

STONE, O'BRIEN & HAMMOND,
JAMES D. HAMMOND,
CATHERINE NOONAN,
Of Counsel.

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Respondent Louis P. Moutanous, as Sheriff of the County of Marin, State of California, respectfully submits the following opposition to the petition for writ of certiorari filed by the Petitioner herein.

OPINION BELOW

The opinion sought to be reviewed is that of the United States Court of Appeals for the Ninth Circuit, not yet officially reported, which appears in the Appendix to Petitioner's Brief. Portions of the opinion were unofficially reported as 45 U. S. Law Week 2191. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTORY PROVISION INVOLVED

Pertinent provisions of California Evidence Code Section 1016 are set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. When the plaintiff in a personal injury suit claims damages due to emotional distress, does the plaintiff's treating psychiatrist have a constitutional right to assert a privilege to withhold relevant testimony concerning the plaintiff-patient's emotional injuries, regardless of patient's wishes, on the basis that California Evidence Code §1016 unconstitutionally interferes with the patient's rights to privacy, due process and equal protection of the law?

2. Does California Evidence Code §1016 deprive a patient litigant of her rights to privacy, due process and equal protection of the law by requiring disclosure of otherwise privileged information which is relevant to a specific emotional condition that the patient-plaintiff has tendered as an issue in a suit for personal injuries?

STATEMENT OF THE CASE

This case involving the interpretation of California Evidence Code §1016 arises out of a personal injury action brought against Respondents by Petitioner's patient, Joan Seebach. Section 1016 of the California Evidence Code, the so-called "patient-litigant" exception to the psychotherapist-patient privilege, requires disclosure of communications made to a psychiatrist concerning mental or emotional conditions which the patient has put into issue in a suit for damages. In a highly emotional narrative, Petitioner would lead the Court to believe that the challenged section violates a patient's privacy by requiring her to divulge all her personal information including the most intimate fantasies which she may have confided to her psychotherapist whenever she brings a suit for personal injuries and damages. On the contrary, Evidence Code §1016 both on its face, and as interpreted by the California Supreme Court, in the case of *In re Lifschutz* (1970) 2 C.3d 415, 467 P.2d 577, 44 A.L.R. 3d 1, strictly limits a psychotherapist's testimony to information which is relevant to a specific emotional condition which the patient herself puts in issue.

Furthermore the Petitioner would have the Court believe that the Respondents in this case are attempting to violate plaintiff-patient's privacy by demanding a full account of her entire psychiatric history and the complete text of her confidences in the course of therapy, regardless of relevance to her personal injury claims. Respondents in this case have *not* asked Petitioner to disclose all the plaintiff's confidential communications to him. Rather, the entire controversy involves Petitioner's refusal to answer eleven specific questions which do not impinge on the content of confidential communications. Instead, defendant seeks the Petitioner's professional opinion, based upon his treatment of the plaintiff, as to whether she was suffering from an abnormal emotional condition; whether this condition was related to the accidents in question or to some earlier event in her life, and whether the condition had improved as a result of the Petitioner's care. The answers to these questions are indispensable to the defendant's determination of the extent of his liability for Miss Seebach's claimed emotional difficulties.

The plaintiff in this case, Joan Seebach, was involved in a series of automobile accidents which are the subject of her suit against Respondents for personal injuries. A neurologist who was treating Miss Seebach for her injuries felt that she might be suffering some emotional sequelae following her involvement in one of the accidents. Therefore he referred her to the Petitioner, Dr. Caesar, who saw Miss Seebach approximately twenty times for psy-

chiatric therapy. Although she did not specifically plead an emotional condition in her Complaint, Miss Seebach and her attorney indicated in deposition and in answers to interrogatories that the expenses for psychotherapy with Dr. Caesar were an element of the damages claimed. Defendants therefore noticed the deposition of Dr. Caesar to determine the cause and degree of Miss Seebach's emotional injuries and the nature, extent and progress of her treatment.

Dr. Caesar appeared for his first deposition but refused to answer any questions. He claimed that under Evidence Code §1014 any information he might have was privileged in the absence of Miss Seebach's consent to his testimony. When he was informed by Miss Seebach's attorney that she had waived her privilege, Petitioner indicated that in his opinion her consent was irrelevant. Petitioner believed *he* had a right to an absolute privilege concerning psychotherapeutic communications and he persisted in his refusal to testify.

After a hearing on the matter, the Marin County Superior Court rejected Dr. Caesar's contention that the California Supreme Court holding in *In re Lifschutz*, supra, precluded the defendant from taking his deposition. That case holds that a psychotherapist does not have a constitutional right to assert a patient's privilege with respect to a communication if the privilege has been waived or if the communication falls within the patient-litigant exception of Evidence Code §1016. The Superior Court found that Miss Seebach had waived the psychotherapist-patient

privilege by placing her emotional condition in issue and that §1016 required Dr. Caesar to attend the deposition and to answer all questions with regard to her emotional condition.

At the second deposition Dr. Caesar continued to refuse to answer any questions concerning his consultations with Miss Seebach. The Superior Court ordered the Petitioner to answer eleven relevant questions and he petitioned the California Court of Appeal for a writ of certiorari directing the Marin County Superior Court to annul its order. In its opinion the Appellate Court held that a psychotherapist does not have a constitutional right to absolute confidentiality regardless of the wishes of his patient and that psychiatrically cognizable conditions were put in issue in the personal injury action. The Court held that the Superior Court order required Petitioner to answer the eleven questions, which were "... directly related to plaintiff's psychiatric condition which plaintiff and her counsel claim resulted from the accidents." (Appendix C, at xvi) In examining the questions the Appellate Court concluded that, "[t]here is nothing appearing from the eleven questions which would indicate an answer referring to any condition of plaintiff's other than a condition for which she is seeking pecuniary recovery." (Appendix C, at xvii). The Court therefore denied the petition but, sensitive to the interest of the plaintiff, remanded the cause to the Trial Court for consideration of possible protective measures which would safeguard the plaintiff's personal privacy without diminishing the rights of the defendants in discovery or at time of trial.

Neither the Petitioner nor the plaintiff moved for a suitable protective order. After the Appellate Court's ruling, the plaintiff expressly waived any objections to Dr. Caesar's testimony. (Appendix B) Petitioner sought review in the California Supreme Court which denied certiorari without opinion. The subsequent petition for habeas corpus in the United States District Court was similarly denied without written comment.

In his appeal to the U. S. Court of Appeals for the Ninth Circuit, Petitioner argued that §1016 violated *his* privacy and that the constitution requires a psychotherapist to have an absolute privilege not to disclose communications made in the course of psychiatric treatment because such disclosure may be harmful to the patient's emotional health and thus force the doctor to violate his Hippocratic oath. The Court found that the *Lifschutz* decision fully and correctly disposed of Petitioner's contentions and it rejected Petitioner's argument that the decisions of this Court in *Roe v. Wade* (1973) 410 U.S. 113 and *Doe v. Bolton* (1973) 410 U.S. 179, invalidated the holding of *Lifschutz* by expanding the constitutional dimensions of the doctor-patient relationship to require absolute privilege for all communications in the course of psychotherapy. Referring to the language of *Roe v. Wade*, 410 U.S. 113, at 153-154, the Court held that although the doctor-patient relationship is within the patient's constitutionally protected zone of privacy, this right to privacy is nevertheless conditional, not absolute and may be subject to state regulation. (Petitioner's Appendix, at 7) As with all

fundamental constitutional rights, the right to privacy must be balanced with competing individual rights and compelling State interests.

The U. S. Court of Appeals found that §1016 on its face and as interpreted by the holding in *In re Lifschutz* does not unconstitutionally deny plaintiff any privacy rights. Rather, the information required under §1016, particularly the information sought in this case, is no more than is absolutely necessary to serve the State's compelling interests in insuring the integrity of its judicial process and safeguarding the defendant from being deprived of his property without due process of law.

Because Dr. Caesar's refusal to testify was obstructing the process of the litigation to the prejudice of all the parties, Miss Seebach's attorney had her consult with a forensic psychiatrist, Dr. Hume, for a diagnosis prior to trial. Partly because of her experiences with Dr. Caesar, Miss Seebach was reluctant to meet with Dr. Hume and consulted her for only two hours. In Dr. Hume's opinion, Miss Seebach was suffering from a mild depression as a result of her injuries. However, Dr. Hume's testimony was limited and was not an adequate substitute for the testimony of the treating psychiatrist, "since she was unable to testify with respect to Miss Seebach's condition when she was examined by Dr. Caesar or any change in condition during the rather extended period of psychotherapy." (Petitioner's Appendix, at 13).

Therefore plaintiff's ability to establish her claim for emotional damages and the Respondent's oppor-

tunity to assess the extent of his liability and defend his case has been substantially prejudiced by Dr. Caesar's unwarranted refusal to testify.

REASONS FOR DENYING THE WRIT

1. UNDER THE FACTS OF THIS CASE PETITIONER DOES NOT HAVE STANDING TO RAISE THE QUESTION OF WHETHER CALIFORNIA EVIDENCE CODE SECTION 1016 UNCONSTITUTIONALLY INTERFERES WITH HIS PATIENT'S RIGHT TO PRIVACY, DUE PROCESS, AND EQUAL PROTECTION OF LAW.
- a. Petitioner is not harmed by the application of Evidence Code §1016.

Petitioner does not have standing to raise the questions raised in the Petition because the application of California Evidence Code §1016 does not harm Petitioner or affect any of his constitutional rights. See *Sierra Club v. Morton* (1972) 405 U.S. 727. Petitioner states that he faces incarceration for his stand in "maintaining the essential ethical mandate of his profession, that he not break the silence which is necessary for him to function as a healer." (Petition, at 13) However, Petitioner's entire argument is based upon the assertion of the rights of a third party. The full content of the Petitioner's argument is not that he himself is faced with an unconstitutional deprivation of rights but that the Code section compelling his testimony in his patient's suit for damages violates the rights of his patient. Petitioner's position in this case is that of a witness in civil contempt of Court for refusing to testify on the grounds that the statute compelling his testimony unconstitutionally

infringes on the privacy right of a party in the case. This Court has already resolved such a situation in the case of *Blair v. United States* (1919) 250 U.S. 273, when it held that a witness in an action could not refuse to testify on the grounds that the statute involved was unconstitutional. Petitioner incorrectly cites the holding of *Hensley v. Municipal Court* (1973) 411 U.S. 345, as giving him standing to challenge the constitutionality of §1016 by asserting the privacy rights of his patient. That case held that a person released on his own recognizance is in custody within the meaning of the federal habeas corpus statute. Neither *Hensley*, nor any other case decided by this Court is authority for the proposition that a person in Petitioner's position has standing to assert the rights of third persons.

This Court has held repeatedly that it will not review a case unless the questions presented have been properly brought before the Court by the person whose interests entitle him to raise them. *Blair v. United States* (1918) 250 U.S. 273, 279; *Moose Lodge v. Irvis* (1972) 407 U.S. 163; *Sierra Club v. Morton* (1972) 405 U.S. 727. This Court said in *Barrows v. Jackson*:

"Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party . . . The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to cases and controversies. Apart from the jurisdictional requirement, this Court has developed a complimentary rule of self-restraint for its own

governments . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others [Cites omitted] The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation."

Barrows v. Jackson (1952) 346 U.S. 249 at 255.

Petitioner is unable to show that he is prejudiced by the operation of §1016. No communications or information personal to the Petitioner are sought to be disclosed. Nor does §1016 regulate or seek to affect the way Petitioner practices his profession. In the case of *In re Lifschutz*, 2 C.3d 415, 467 P.2d 557, the California Supreme Court correctly determined that, ". . . compelled disclosure of relevant information obtained in a confidential communication does not violate any constitutional privacy rights of the psychotherapist." 2 C.3d 415 at 423. "It is the depth and intimacy of the *patient's* revelation that give rise to the concern over compelled disclosure; the psychotherapist, though undoubtedly deeply involved in the communicative treatment, does not exert significant privacy interest separate from his patient." 2 C.3d at 424.

The validity of this conclusion is not affected by the recent decisions of this Court in *Singleton v. Wulff* (1976) _____ U.S. _____; *Planned Parenthood of Central Missouri v. Danforth* (1976) _____ U.S. _____; *Bellotti v. Baird* (1976) _____ U.S. _____; *Roe v. Wade* (1973) 410 U.S. 113; *Doe v. Bolton* (1973) 410 U.S.

179, or *Griswold v. Connecticut* (1965) 381 U.S. 479, which are cited by Petitioner. The holdings of those cases that the treatment relationship between a doctor and his patient is within the *patient's* zone of privacy does not, under the facts of this case, give standing to the Petitioner to assert his patient's privacy interest. Petitioners in the cited cases had standing to assert the privacy interests of third parties because, as this Court reasoned, "the rights of the third parties pressed [there], are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Griswold v. Connecticut* (1965) 381 U.S. 479. This narrow exception to the normal requirements of standing is not applicable here because Petitioner's patient is herself a party to the action and therefore is fully capable of challenging the constitutionality of Evidence Code §1016 for any threat that it might pose to her rights of privacy and due process. Not only has the patient in this case chosen not to challenge Evidence Code §1016 as it applies to her, but she has voluntarily and affirmatively taken a stance diametrically opposed to the position of Petitioner. (Appendix B)

- b. **Petitioner's interests in this case are adverse to those of the person whose constitutional rights he allegedly seeks to protect.**

Petitioner's basic complaint is that the State through Evidence Code §1016 infringes upon the patient's right to privacy because it does not grant to the Petitioner the power to prevent his patient

from disclosing information about herself. Petitioner claims that he is constitutionally entitled to this power because the psychotherapeutic relationship may suffer if the patient is able to compel her therapist to disclose her confidences to him. Furthermore, Petitioner claims that requiring him to testify causes him to breach her confidences to him and thus go against the tenets of his profession.

Petitioner's position is untenable under the facts. In this case, the Petitioner's patient expressly waived any privileges attaching to her confidential relationship with him and it was her own desire that he answer the questions posed. (Appendix B) Thus by the patient's own action there was no longer any confidential relationship to protect and Petitioner's disclosures would not have constituted a breach of faith. Dr. Caesar's continued refusal to testify is in direct opposition to the patient's expressed interests and desires.

- c. **Under the facts of this case, the act of granting Petitioner standing to assert the privacy interests of the patient would, in itself, be a threat to the patient's constitutional rights.**

Petitioner contends that the nature of psychotherapy is such, that regardless of the patient's wishes, the psychotherapist must exercise ultimate control over all information concerning the treatment relationship. He maintains that this unilateral control is necessitated by the fact that disclosure will jeopardize the treatment relationship and can be harmful to the patient in a way that he is incapable of understanding. (Petition, at 4-5) Petitioner's argu-

ment does more to threaten than it does to protect the individual patient's constitutional right to privacy. The danger of Petitioner's position lies in the fact that, under the guise of protecting his patient's right to privacy and human dignity, Petitioner is actually denying those rights. Privacy is not merely an interest in the nondisclosure of personal information. A person's right to privacy consists of *control* over the dissemination of information *about himself* and access to the information necessary to make personal decisions. It is this element of personal autonomy which is the keystone of the right to privacy and which is essential to the maintenance of a free society. See A. Westin, *Privacy and Freedom* 8-63, 330-38 (1st Edition 1967); Fried, "Privacy", 77 *Yale Law Journal* 475 (1968); *Griswold v. Connecticut* (1965) 381 U.S. 479; R. G. Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy", 64 *Michigan L. Rev.* 197.¹

Petitioner contends that the State has no power to infringe upon the patient's control over his personal privacy. It is therefore anomalous for him to suggest that this power should rest in a third person, namely himself, against whom a patient would have

¹Cases in which the therapist opposes the patient's desire to disclose psychiatric information are not infrequent. See, *Commonwealth ex rel. Romanowicz v. Romanowicz* (1968) 213 Pa. Super. 382, 248 A.2d 238, 240; *Hampton v. Hampton* (1965) 241 Ore. 277, 405 P.2d 549. It is precisely because the psychotherapist may attempt to deny the patient's autonomy that statutes creating the psychotherapist-patient privilege make the patient the holder of the privilege. See, Suarez and Hunt, "The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since *In Re Lifschutz*." U. C. L. A.-Alaska L. Rev. 2, 14 (1971).

even less recourse should there arise a situation, such as the one here, where the patient's interests and desires are opposed to those of the doctor. In *Planned Parenthood of Central Missouri v. Danforth* (1976), U.S. this Court held that decisions affecting personal privacy and autonomy are solely the prerogative of the person primarily affected. That case involved a state statute forbidding married women to have abortions without the consent of the husband. The husband's interest in that situation was far more substantial and personal than the Petitioner's interest in this case. Nevertheless, the Court found that the right of privacy is necessarily accompanied by personal autonomy and that the State cannot delegate authority which it does not have. 49 L.Ed. 788 at 805.

Petitioner's contention that the psychotherapist must be able to withhold information regardless of the wishes of his patient, because she lacks the understanding to make to make her own decision, reflects a paternalistic attitude which is totally incompatible with the basic tenets of a free society. See Fried, "Privacy" 77 *Yale Law Journal* 475 (1968). This Court should be wary of denying any legally competent person the right to make a personal decision on the ground that this denial of freedom is for her own good. Surely the psychiatrist is in a position to counsel the patient as to her best interests; however, the final decision must be hers. Anything less is a denial of her dignity and personal freedom. Constitutional rights do not lose their force simply

because the exercise of those rights may be unwise in a given situation.

2 THE DECISION OF THE COURT BELOW WAS CORRECT

Assuming, for the sake of argument, that the Petitioner does have standing to raise the questions presented, these arguments were carefully analyzed and correctly decided by the Court below which based its opinion on the California Supreme Court decision in *In re Lifschutz* (1970) 2 C.3d 415, 467 P.2d 557, 44 A.L.R.3d 1. In that case the California Supreme Court found that there is no constitutional requirement of an absolute privilege against disclosure of communications by a patient to her psychotherapist. The Court held that California Evidence Code §1016 is not an unconstitutional infringement of the patient's privacy, since the power to limit or prevent disclosure rests solely with the plaintiff. The state in no way forces disclosure of matters that she does not wish to adjudicate. That Court also held that neither Evidence Code §§1014, 1016 nor the U.S. Constitution was interpreted in *Griswold v. Connecticut* (1965) 381 U.S. 479, created an independent right of privacy of the doctor in a doctor-patient relationship. The patient is quite properly the holder of the privilege—no personal privacy rights of the therapist are jeopardized by its waiver. In this case, the patient-plaintiff has expressly waived any objection to the testimony of her therapist. She informed him that she was no longer his patient and that it was

her wish that he testify concerning the matters in issue. (Appendix B; Petitioner's Appendix at 3-4)

Both the California Court of Appeal and the U.S. Court of Appeals correctly held that the recent decisions of this Court in *Roe v. Wade* (1973) 410 U.S. 113 and *Doe v. Bolton* (1973) 410 U.S. 170 cited by Petitioner did not affect the validity of the *Lifschutz* ruling that neither the patient nor the psychotherapist has an absolute right of privacy with regard to the treatment relationship. In the words of the California Court of Appeal: "The situations in those cases are a long way from the situation in the case at bench. There the violation* of the right of privacy was forced on the individual. In the instant case it is the action of the individual himself who, in order for financial gain, is required to waive the particular right of privacy." (Opinion of the California Court of Appeal, Appendix C, at xii). Also, the right of privacy existing in the doctor-patient relationship in the cited cases was held to be conditional and could be regulated where appropriate to protect compelling State interests. (Petitioner's Appendix, at 8).

- a. California Evidence Code §1016 is not an overly broad intrusion into the patient's right of privacy.

Petitioner mistates the law when he argues that the patient-litigant exception to the psychotherapist-patient privilege is unconstitutionally overly broad because it requires the patient to either disclose her entire psychiatric history or abandon her claim for emotional damages. Petitioner asserts that the Cali-

ifornia Supreme Court decision in *In re Lifschutz* attempted to cure this overbreadth by limiting the scope of disclosure. Petitioner's argument ignores the plain language of the statute in question and the purpose and effect of the *Lifschutz* ruling. California Evidence Code §1016 states:

"There is no privilege under this article as to a communication *relevant to an issue* concerning the mental and emotional condition of the plaintiff if such issue has been tendered by:

a) The patient . . ." (emphasis added)

The Court in interpreting this Code section looked to the plain language of the statute and concluded that it was not an unwarranted invasion of the patient's privacy because the statute limits inquiry to "those matters which the patient himself has chosen to reveal by tendering them in litigation." *In re Lifschutz* (1970) 2 C.3d 415, 427, 467 P.2d 557. The California Supreme Court was sensitive to the need for confidentiality in the psychotherapeutic relationship and demonstrated a clear understanding of the constitutional basis of the patient's expectations of privacy. However, the Court concluded:

"Even though a patient's interest in the confidentiality of the psychotherapist-patient relationship rests, in part, on constitutional underpinnings, all state 'interference' with such confidentiality is not prohibited. *In Section 1016 we do not deal with a provision which seeks to proscribe the association of psychotherapist and patient entirely, but instead we encounter a provision carefully tailored to serve the historically*

important state interests of facilitating the ascertainment of truth in connection with legal proceedings." (Cites omitted) 2 C.3d 415 at 432. (emphasis added)

In the case of *Roberts v. Superior Court* (1973) 9 C.3d 330, 508 P.2d 309, the California Supreme Court reaffirmed its ruling in *Lifschutz* by strongly rejecting the argument that §1016 was an automatic and complete waiver of the psychotherapist-patient privilege whenever the patient brings a routine civil suit for personal injury. The Court again stressed that §1016 requires a waiver only when assertion of the privilege would allow the patient to sue for specific emotional injuries without supplying evidence of the claim.

In addition to the statutory limitation, the Court in *Lifschutz* noted that valid privacy interests of the patient were further safeguarded by the availability of protective measures provided in Code of Civil Procedure §2019(b)(1) and by Evidence Code §352 which allows the judge in his discretion to exclude evidence when its prejudicial effect outweighs its probative value. Petitioner argues that the usefulness of a protective order is an illusion. In this case, however, the futility of a protective order is a theoretical conclusion for which Petitioner offers no factual support. The plaintiff here never objected to the questions asked of Petitioner and no protective orders were needed or sought.

Petitioner also argued that the statute must fall for overbreadth because less burdensome alternatives

are available to the State. Petitioner does not reveal what those less burdensome methods might be, although he suggests that examination by a forensic psychiatrist for the purposes of diagnosis prior to trial is an acceptable alternative. As the U. S. Court of Appeals aptly pointed out, testimony resulting from such an examination cannot, in any way, substitute for the observations of the psychotherapist made in the candid atmosphere of the treatment relationship. (Petitioner's Appendix, at 13)

Petitioner's other suggestion that the psychotherapist be granted an absolute privilege is equally untenable. As has already been demonstrated, such a privilege would be subject to constitutional challenge by either the plaintiff-patient or the defendant in a case of this kind.

- b. **The patient-litigant exception set out in California Evidence Code §1016 is necessary to insure the integrity of the judicial process and safeguard the rights of the defendant to due process of the law.**

Citing Mr. Justice White's concurring opinion in *Murphy v. Waterfront Commission* (1964) 378 U.S. 52, 93-94, the Court below correctly determined that the State has a compelling interest in the ascertainment of truth in legal proceedings. (Appendix to Petitioner's brief, page 11) The right to compel testimony in order to determine truth is basic to our system of justice. See *Blackmer v. United States* (1932) 284 U.S. 421; *Blair v. United States* (1919) 250 U.S. 273, 279; *Wilson v. United States* (1911) 221 U.S. 361; *Louisell and Sinclair*, "Reflections on

the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective" 49 Cal. L. Rev. 30, 42 (1971).

In addition to its interest in insuring the ascertainment of truth in its judicial process, the State has an interest in promoting activities and relationships which are of a particular benefit to the social structure. See R. M. Fisher, "The Psychotherapeutic Professions and the Law of Privileged Communications", 10 *Wayne L. Rev.* 609, 610-612 (1954): Note, "Limitations on California Professional Privileges: Waiver Principles and Policies They Promote", 9 *University of California, Davis*, (1976) 477, 479-480; *Louisell and Sinclair*, *supra*; 8 Wigmore, *Evidence* §2200 (McNaughton rev. ed. 1961). In furtherance of this interest the State has created privileges against disclosure of evidence gained through certain relationships where the legislature has determined that the probative value of such disclosure is outweighed by the value to society of protecting the confidentiality of the relationship.

However, it is misleading to say and incorrect to assume, as Petitioner has done, that the State has demonstrated its lack of a compelling interest to insure that truth is ascertained in legal proceedings because California's legislative scheme "allows broad exceptions to the proposition that all must fully testify." (Petition at 8.) On the contrary, a more thorough analysis of California's legislative scheme reveals the State's genuine concern that its judicial proceedings be conducted in accordance with the principles of due

process of law. All of the privileges cited by Petitioner are subject to statutory exception when the circumstances are such that upholding the privilege would obstruct justice or exclude evidence essential to a fair hearing and deny a party to the proceeding a full opportunity to present evidence and defend claims. (See Petitioner's Appendix at 9-10.)

c. **California Evidence Code §1016 does not violate the Equal Protection Clause of the Fourteenth Amendment.**

Section 1016 does not violate the Equal Protection Clause by requiring the plaintiff to present evidence supporting her claims of emotional damage in a suit for personal injuries. Instead, Section 1016 operates to insure that all parties to civil actions in California Courts are guaranteed equal protection of the laws. As the Court below stated, "Every person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based. Section 1016, *rather than discriminating improperly against psychotherapy patients, instead places them on the same footing as other litigants.*" (Petitioners' Appendix at 9, emphasis added)

Petitioner's argument that the State conditions access to its Courts upon a waiver of the patient-plaintiff's constitutional right is not correct. Plaintiff is not denied access to the Courts but is merely being asked to produce evidence directly relevant to the nature and cause of her alleged damages so that the defendant may be given a fair opportunity to defend. The presentation of evidence supporting claims for

damages is simply what the principles of due process demand of every party seeking restitution through the Courts.

The privilege in psychotherapeutic relationships is designed to protect the patient from the humiliation and embarrassment which might result from disclosure of the condition for which the patient is receiving treatment. However, when the patient herself discloses her mental difficulties by placing their existence, cause, and extent in issue in a suit for damages, there is no longer any reason for the privilege. See *City and County of San Francisco v. Superior Court* (1951) 37 C.2d 227, 232, 231 P.2d 26, 29. Furthermore, as the Court below observed, Evidence Code Section 1016 "neither contemplates a complete waiver of the psychotherapeutic communication privilege nor seeks to deter psychotherapy patients from instituting lawsuits . . . disclosure is strictly limited to that information placed in issue by the plaintiff himself and about which he and his psychotherapists have practically exclusive knowledge." (Petitioner's Appendix at 9) To grant a privilege to exclude evidence of this nature would be unfair. Plaintiff cannot assert a claim for damages and then foreclose relevant investigation into the truth of her claim. *Koump v. Smith* (1969) 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864; *Schlagenhauf v. Holder* (1964) 379 U.S. 104, 126.

The case of *Boddie v. Connecticut* (1971) 401 U.S. 371, 379, cited by Petitioner to support his argument

that the plaintiff-patient is unconstitutionally denied access to the Courts is inapplicable because that case involved a special set of facts which bear no relationship to the circumstances of this case. In *Boddie* the parties were denied access to the Courts to obtain a judicial dissolution of their marriage because they were too poor to pay the filing fees. This Court held that it was a denial of due process and equal protection to condition the dissolution of marriage, which involves interests of basic importance to society, on the economic status of the parties. The Court spoke in terms of the State's denial of access to the Courts because there was no alternative forum available for the resolution of this fundamental interest. The Court limited its decision in *Boddie* to the facts of that case and went on to say:

"We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship." 401 U.S. 371 at 382.

This Court has said:

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, [cites omitted] or who, without justifiable excuse, *violates a procedural rule*

requiring the production of evidence necessary for orderly adjudication."

Hammond Packing Co. v. Arkansas (1909) 212 U.S. 322, 351, 29 S.Ct. 370, 380, 53 L.Ed. 530 (emphasis added).

What the Constitution does require is:

"An opportunity . . . granted at a meaningful time and in a meaningful manner [Citations omitted] for [a] hearing appropriate to the nature of the case, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 313, 70 S.Ct. at 657."

In the case at bar, plaintiff has not been denied access to the Court. Unlike cases of *Ortwein v. Schwab* (1973) 410 U.S. 656 and *United States v. Kras* (1973) 409 U.S. 434, cited by Petitioner, no preconditions have been placed upon filing a claim for personal injuries. She is not required to file a bond, *Cohn v. Beneficial Loan Corporation* (1949) 337 U.S. 541; she is not discriminated against on the basis of wealth, *Griffin v. Illinois* (1956) 351 U.S. 12, nor she is not denied any constitutional rights without a hearing of the evidence in her favor. *Sniadach v. Family Finance Corporation* (1969) 395 U.S. 337; *Goldberg v. Kelly* (1970) 397 U.S. 254.

The law demands fairness, justice and equality. Every litigant, plaintiff and defendant alike, is entitled to access to evidence required to prove or disprove the matters at issue. This is precisely what section 1016 CCP, State of California attempts to achieve and does achieve.

CONCLUSION

For all of the above reasons, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS J. MALONEY,

County Counsel of Marin County,

Counsel for Respondents.

STONE, O'BRIEN & HAMMOND,

JAMES D. HAMMOND,

CATHERINE NOONAN,

Of Counsel.

March 9, 1977.

(Appendices Follow)

APPENDICES

Appendix A

QUESTIONS WHICH DR. CAESAR REFUSED TO ANSWER

1. "Did he [Dr. Klemme] say why, in his opinion it [a talk with Dr. Caesar] might be helpful to her?

2. [A]t the last time or at the occasion of your last consultation with her, would you describe her mental condition as being one of mild depression pertaining to the—or as a result of the physical injuries which she says that she was suffering from as a result of the three accidents which I previously referred to?

3. Would you please state what that opinion is, Doctor? [With respect to whether Miss Seebach suffered from any emotional distress of any kind as a result of her having been in those two accidents.]

4. [D]id you notice an improvement with respect to the degree of her depression over the period of time that she was under your treatment?

5. [A]re you able, Doctor, to relate the condition which you've described concerning the state of Miss Seebach's depression or the degree of Miss Seebach's depression at the time of your initial two interviews to any particular trauma or incident that may have occurred in her life?

6. Do you have an opinion as to whether or not the depression which you've described that existed at the time of your initial two interviews related to trauma that Miss Seebach suffered as a result of the two accidents in which she was involved, that you now recall?

7. Will you state what that opinion is?

8. [D]id you form an opinion immediately subsequent to your initial two interviews with Miss Seebach at the hospital concerning any emotional distress which she might have been suffering from which directly related to the two accidents which we've previously referred to in which she was involved?

9. Doctor, did you, during the course of your treatment of Miss Seebach—and by 'course,' I mean all of your interviews and consultations with her—form any opinion that her condition, mental or emotional condition, did not, in any way, relate to the accident in which she was involved and which you have knowledge of?

10. . . . whether the state of depression was a result of the combination of the accidents in which she was involved which you now recall and other factors in her life?

11. After the letter, [to another doctor which said he could not say whether psychological factors played a role in the back pain] did you form an opinion as to whether or not psychological factors played a role in the origin or aggravation of the cervical pain which Miss Seebach said that she was suffering from?"

Appendix B

(Letterhead of
Law Offices of
Raymond E. Bright
463 Pacific Avenue
San Francisco
94133)

December 13, 1976

Clerk of the Court

United States Court of Appeals for the Ninth Circuit
7th and Mission Streets

P. O. Box 547

San Francisco, California 94101

Re: George R. Caesar, M.D., Petitioner vs. Louis
P. Mountanos, as Sheriff of the County of
Marin, State of California, et al., Respond-
ents.

Petition for Writ of Certiorari to the United
States Court of Appeals for the Ninth Cir-
cuit.

Dear Sir:

I have just received petitioners Petition for Writ of Certiorari in the above entitled case. Although my client, Joan Seebach, is not a party to said petition, she is the plaintiff in the underlying case pending in the Superior Court, Marin County, State of California.

Although Miss Seebach has not taken part in any of the appeals by Dr. Caesar, I would desire to clarify

any possible misunderstanding of my client's position regarding the privilege claim by Dr. Caesar.

In September of 1972 plaintiff did, as a favor to Dr. Caesar, file an attempted revocation of any waiver of the privilege. After the Superior Court's ruling, plaintiff has not claimed any privilege. This has been stated to all the parties numerous times, including in open Court, in the Superior Court of the State of California, In And For The County of Marin, and in Letters to all counsel including letters of July 31, 1975 and January 5, 1976.

In the jurat letter of July 31, 1975, to the defense attorneys in Miss Seebach's personal injuries action and to Dr. Caesar's attorney, Kurt W. Melchior, I stated "in regard to Dr. Caesar, my client has waived the doctor-patient privilege and is agreeable to Dr. Caesar's testifying in this case". In the letter of January 5, 1976 to the same attorneys, I stated "as you know, my client has not and does not presently have any objection to Dr. Caesar testifying".

Since Miss Seebach's position as patient did not seem to be fully expressed in the petition, I thought I should bring this point to the Court's attention.

Sincerely,

REB

RAYMOND E. BRIGHT

REB:djh

Dictated/Not Read

cc: James D. Hammond, Jr., Esq.

David J. Costamagna, Esq.

Kurt W. Melchior, Esq.

Appendix C

In the Court of Appeal of the State of California
First Appellate District, Division Four

1 Civil No. 32,556

Superior Court
Nos. 54650, 56123

George R. Caesar,	Petitioner,
vs.	
Superior Court of the State of California in and for the County of Marin,	Respondent.
Hans Van Boldrick, Robert Wilcox, John Wilcox, County of Marin and Madsen Con- struction Company,	Real Parties in Interest.

[Filed May 15, 1973]

OPINION

Petition for writ of certiorari directing the Marin County Superior Court to annul its order directing petitioner to answer certain questions.¹

¹An amicus curiae brief in support of the petitioner has been filed herein by Hassard, Bonnington, Rogers & Huber, Howard Hassard, David E. Willett and Laurence W. Kessenick, attorneys for the California Medical Association.

Questions Presented

1. Psychotherapist does not have a constitutional right to absolute confidentiality.
2. Psychiatrically cognizable conditions were put in issue in the personal injury actions.
3. The court order does not afford plaintiff and petitioner sufficient protection.

Record

Joan E. Seebach (hereinafter referred to as "plaintiff") was injured in two different automobile accidents. To recover damages for her injuries she filed two personal injury actions in the Marin County Superior Court, one against real parties in interest Wilcox as defendants, the other against the County of Marin, Madsen Construction Company and Hans Van Boldrick as defendants. Defendants² noted the deposition of petitioner who is a licensed physician specializing in the practice of psychiatry and psychotherapy, and who was consulted some 20 times by plaintiff subsequent to her accidents. At the taking of his deposition, petitioner asserted the psychotherapist-patient privilege pursuant to sections 1012 and 1015 of the Evidence Code and refused to testify concerning his knowledge of plaintiff derived from the psychotherapist-patient relationship. Defendants then certified to the court petitioner's failure to answer questions. The court after a hearing made its order compelling petitioner to testify and answer the questions posed to him and certified to the court. The

²Unless otherwise noted herein, "defendants" will refer to the defendants in both actions. It appears that plaintiff was involved in three auto accidents, two resulting in the abovementioned suits.

order further provided that if petitioner refused to testify he would be deemed in contempt of the court. Execution of sanctions was stayed to enable petitioner to attack the validity of the order in the appellate court.

Evidence Code section 1016 applies.

Section 1014 provides in pertinent part "... except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: (a) The holder of the privilege; . . . (c) The person who was the psychotherapist at the time of the confidential communication, *but such person may not claim the privilege . . . if he is otherwise instructed by a person authorized to permit disclosure.*" (Emphasis added.)

Section 1015 provides: "The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014."

Section 1016 provides: "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) The patients; . . ."

³Evidence Code section 996, referring to the physician-patient relationship is substantially the same as section 1016.

Petitioner contends: (1) That a psychotherapist has a constitutional right to absolute confidentiality in his communications with, and treatment of, patients which gives him the right to refuse to disclose such confidential communications regardless of the wishes of a patient in a particular case.

(2) That in the personal injury actions plaintiff has not put a psychiatrically cognizable condition in issue and therefore specifically refused to waive the privilege between her and petitioner.

(3) That in any event, the court order fails to afford petitioner and plaintiff the protection accorded to psychotherapeutic communications under the decisional law of California.

1. *Psychotherapists do not have a constitutional right to absolute confidentiality.*

The contention of petitioner on this subject has been answered by the Supreme Court in *In re Lifschutz* (1970) 2 Cal.3d 415, 422-423, where the petitioner made identically the same contention on this issue as does petitioner here. The court said: "Properly viewed, the broadest issue before our court is whether the Legislature, in attempting to accommodate the conceded need of confidentiality in the psychotherapeutic process with general societal needs of access to information for the ascertainment of truth in litigation, has unconstitutionally weighted its resolution in favor of disclosure by providing that a psychotherapist may be compelled to reveal relevant

confidences of treatment when the patient tenders his mental or emotional condition in issue in litigation. For the reasons discussed below, we conclude that, under a properly limited interpretation, the litigant-patient exception to the psychotherapist-patient privilege, at issue in this case, does not unconstitutionally infringe the constitutional rights of privacy of either psychotherapists or psychotherapeutic patients. As we point out, however, because of the potential of invasion of patients' constitutional interests, trial courts should properly and carefully control compelled disclosures in this area in the light of accepted principles."

The court further said (p. 438): "In sum, we conclude that no constitutional right enables the psychotherapist to assert an absolute privilege concerning all psychotherapeutic communications. We do not believe the patient-psychotherapist privilege should be frozen into the rigidity of absolutism. So extreme a conclusion neither harmonizes with the expressed legislative intent nor finds a clear source in constitutional law. Such an application would lock the patient into a vise which would prevent him from waiving the privilege without the psychotherapist's consent. The question whether such a ruling would have the medical merit claimed by petitioner must be addressed to the Legislature; we can find no basis for such a ruling in legal precedent or principle."

It should be remembered that "since the exception compels disclosure only in cases in which the patient's own action initiates the exposure, 'intrusion' into a

patient's privacy remains essentially under the patient's control." (*In re Lifschutz, supra*, 2 Cal.3d 415, 433.)

Petitioner makes certain contentions which he claims were not made or fully considered in *Lifschutz*. The first is that *Lifschutz* did not answer the claim that the medical profession cannot practice psychotherapy successfully "under the *Lifschutz* formulation of privilege waiver." It appears to us that the Supreme Court answered the claim rather well. In part, it stated: "Although petitioner has submitted affidavits of psychotherapists who concur in his assertion that total confidentiality is essential to the practice of their profession, we cannot blind ourselves to the fact that the practice of psychotherapy has grown, indeed flourished, in an environment of non-absolute privilege. No state in the country recognizes as broad a privilege as petitioner claims is constitutionally compelled. Whether psychotherapy's development has progressed only because patients are ignorant of the existing legal environment can only be a matter for speculation; psychotherapists certainly have been aware of the limitations of their recognized privilege for some time. [Citations.]

"Petitioner's broad assertion, moreover, overlooks the limited nature of the intrusion into psychotherapeutic privacy actually at issue in this case. As we explain more fully in Part III *infra*, the patient-litigant exception of section 1016 of the Evidence Code compels disclosure of only those matters which the patient himself has chosen to reveal by tendering

them in litigation." (*In re Lifschutz, supra*, 2 Cal.3d 415, 426-427.)

Petitioner makes the astounding contention that some members of the medical profession when called upon to testify as to a patient's condition have "found it necessary to forget," indicating that to keep those members honest they must be given absolute confidentiality. We doubt that there are many such members.

Petitioner refers to the duty of a physician to do no harm to his patient, and contends that by disclosing the patient's mental condition the patient may be harmed. If so, it would be for the patient's advisers to determine whether the patient should withdraw his claim for damages for that particular condition or to agree to disclosure under conditions which would protect the patient as far as possible and yet not deny the litigant his rights. "[T]he exception [Evid. Code, § 1016] represents a judgment that, in all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters." (*In re Lifschutz, supra*, 2 Cal.3d 415, 433.)

Petitioner refers to the 1972 amendment to the California Constitution which added to the inalienable rights guaranteed by Article I, section 1, the right of privacy and contends that the exception we are dealing with violates the rights of privacy of both plaintiff and petitioner. In support of his position petitioner cites *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, which held the 1969 financial disclosure law (Gov. Code, §§ 3600-3704) which required

every public office and each candidate for public office to file a certain financial statement as to his investments to be unconstitutional as violating the right of privacy of the person affected. He also cites the United States Supreme Court cases of *Roe v. Wade* (1973) 93 S.Ct. 705, and *Doe v. Bolton* (1973) 93 S.Ct. 739, in which the court struck down the abortion statutes of Texas and Georgia, on the ground that they violated the constitutional right of privacy. In the latter case Justice Douglas pointed out, among other matters, that the requirement in the statutes that the abortion procedure must be approved by an abortion committee violated the right of privacy of the woman desiring an abortion and of her doctor. The situations in those cases are a long way from the situation in the case at bench. There the violation of the right of privacy was forced on the individual. In the instant case it is the action of the individual himself who, in order for financial gain, is required to waive the particular right of privacy.

Petitioner has cited no authority holding that a litigant may seek damages for a physical or mental condition he claims to exist, without disclosing the knowledge of his condition by the one most likely to know it—his physician.

2. *Psychiatrically cognizable conditions were in issue.*

As to her injuries plaintiffs complaint alleges that she "suffered personal injuries and pain and suffering and damage to, including, but not limited to, her

right knee, back and neck," and that "plaintiff suffered personal injuries and pain and suffering and damage, including, but not limited to, an aggravation of the injuries suffered in the [first accident]." Plaintiff also alleged that she "incurred and will incur medical and related costs in an amount not presently ascertainable" and "will incur a loss of income in an amount not presently ascertainable."

Plaintiff and her counsel originally waived her privilege, but later after petitioner purported to assert the privilege, plaintiff filed a notice of intention to revoke the waiver and to claim the privilege. The record fails to show whether any court action followed the filing of this notice. However, the authorities are clear that plaintiff must either waive the privilege or withdraw any claim for damages resulting from a condition as to which petitioner could testify. For the purposes of this opinion we will assume that if such a condition exists plaintiff has waived her privilege, and will consider her contention that no such condition exists, in other words, that she is not seeking recovery for any psychiatrically cognizable condition.

That plaintiff is claiming psychiatric injuries from the accidents and that she consulted petitioner concerning them clearly appears from her testimony at her deposition and from her counsel's statements. Her counsel stated:

"Although Miss Seebach makes no specific claims for psychiatric damage in the underlying civil liti-

gation, confining her pleadings to generalities, it is apparent that overlays of generally psychiatric nature are involved. She has been seen during the litigation for evaluation and possible testimony by Dr. Hume, a psychiatric diagnostician who did not treat her. Dr. Hume testified that Miss Seebach had, at the time of her examination, a mild, non-psychiatrically cognizable depression resulting from the accident, but also had a personality generally which would benefit from psychiatric treatment, this latter aspect being unrelated to the accident as to causation. It is evident from Dr. Hume's deposition . . . that these preexisting aspects of personality were involved in the psychotherapy which Miss Seebach received from Dr. Caesar."

Counsel further stated, "it appears that some of the care and treatment [by petitioner] may be involved in this lawsuit" and that Dr. Klemme, who treated plaintiff, and others wondered if, because of injury to her neck and head, "there is a conversion reaction here, or whether there is a depressive reaction."

Plaintiff testified that she went to petitioner because of "various reactions [she] had to things in [her] life" since the accidents, and that Dr. Klemme advised her to see petitioner in hopes that "the limitations that I have had to learn to live with could, you know, be discussed openly, so that I can better adjust to what life—how I can live my life better."

Plaintiff testified "due to these accidents my life style has changed considerably." At oral argument,

it was conceded that plaintiff was not suffering from any physical disability but her whole claim is based upon pain and suffering and her depressed, nervous and discouraged condition resulting from the accidents.

Dr. Hume, consulted by plaintiff, testified that "she appeared to me genuinely mildly depressed as a reaction to the kinds of changes that have occurred in her life as a result of her disabilities," that she needed "specifically psychiatric treatment," and that "her impression was that the reason the psychiatrist, Dr. Caesar, was called in in connection with her case, I believe, after the most recent accident in 1969, that the people that were taking care of her . . . felt that there was some emotional overlay to her problems, that she was magnifying her distress, . . ." Dr. Hume thought plaintiff needed help with her "depression."

The Court found "that the issue tendered by Plaintiff in this litigation is to what extent is whatever mental or emotional distress she has experienced since the accident [sic] attributable to these accidents. In determining this issue it would be necessary to inquire into Plaintiff's present condition and also elicit any information which would bear on her mental and emotional problems prior to the accidents. It would also appear clear that Plaintiff consulted Dr. Caesar concerning mental and emotional distress which she attributes, at least in part, to the accidents."

As the record now appears it is clear that plaintiff is claiming psychiatric injury from her accidents and

therefore that Petitioner's testimony would be relevant⁴ and that the privilege exception would apply.

3. *The court order.*

The intrusion into plaintiff's psychotherapeutic privacy in this case is limited and, as said in *In re Lifschutz, supra*, 2 Cal.3d 415, 427, disclosure can be had of those matters only which the patient herself has chosen by tendering them in litigation. A physician is only required to disclose a patient's "medical treatment and communication concerning the very injury and impairment that was the subject matter of the litigation." (*Roberts v. Superior Court* (1973) 9 Cal. 3d 330, 337, quoting *Lifschutz, supra*, at p. 434.)

The Trial Court in its order limited it to requiring Petitioner to answer only eleven questions which at the taking of his deposition he declined to answer. We have examined those questions and find that they are directly related to plaintiff's psychiatric condition which plaintiff and her counsel claim resulted from the accidents and should be answered by Petitioner. We have in mind "[i]n determining whether communications sufficiently relate to the mental condition at issue to require disclosure, the Court should heed the basic privacy interests involved in the privilege [citation]; in general, the statutory psychotherapist-patient privilege 'is to be liberally construed in favor

⁴The transcript of petitioner's deposition shows that he supplied his "records" concerning plaintiff to defendant's counsel, as both plaintiff and her counsel had given him permission to testify. Petitioner's action in refusing to testify is rather interesting in view of his giving his records to counsel.

of the patient.' [Citations.]" (*In re Lifschutz, supra*, 2 Cal.3d 415, 437.) There is nothing appearing from the eleven questions which would indicate an answer referring to any condition of plaintiff's other than a condition for which she is seeking pecuniary recovery. However, the order does not provide protective measures "to regulate the procedure of the inquiry so as to best preserve the rights of the patient." (*Lifschutz, supra*, p. 437.)

In this case, if plaintiff disavows any claim of psychiatric injuries from the accidents, the Trial Court should set aside its order. (See *Roberts v. Superior Court, supra*.)

At oral argument counsel for the California Medical Association suggested that if plaintiff's advisers fear the effect on plaintiff herself of Dr. Caesar's answers to the questions ordered by the Court, Dr. Caesar's examination could be held in plaintiff's absence, and that before the doctor's deposition is read to the jury a hearing be held before the Court *in camera*. The Court could then strike out any material which it ruled was not relative to the claim for damages. This suggestion may have merit, but there may be other proposals for protective orders which counsel for both parties and those of the California Medical Association could present to the Trial Court. "Even when the confidential communication is directly relevant to a mental condition tendered by the patient, and is therefore not privileged, the codes provide a variety of protections that remain available to aid in safeguarding the privacy of the patient. When inquiry

into the confidential relationship takes place before trial during discovery, as in the instant case, the patient or *psychotherapist* may apply to the Trial Court for a protective order to limit the scope of the inquiry or *to regulate the procedure of the inquiry* so as to best preserve the rights of the patient." (*Lifschutz, supra*, at p. 437; emphasis added.)

The petition is denied so far as it seeks to set aside that portion of the order requiring Petitioner to answer the questions certified to the Court. However, the cause is remanded to the Trial Court for it to consider whether measures for the protection of plaintiff may be required without injury to the rights of defendants.

Bray, J.*

We concur:

Devine, P. J.

Good, J.**

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

**Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.